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IN THE
Supreme Court of the United States

DIANA CASEY, *et al.*,
Petitioners,

v.

RETIREMENT BOARD OF THE RHODE ISLAND EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

Petitioners' request for review of the Question Presented —whether employees who are members of a state retirement system that does not expressly indicate whether or not a contractual relationship is established ever can acquire a right to retirement benefits that is protected by the Contract Clause—is bottomed on two basic propositions.

A. The first proposition is that this Court's decision in *Pennie v. Reis*, 132 U.S. 164 (1889)—which answered the question "no"—is fundamentally inconsistent with this Court's modern Contract Clause jurisprudence, and should be overruled. Petition ("Pet.") at 14-15. In the passing reference that they make to *Pennie* in their Brief in Op-

position ("Opp. Br."), respondents do not take issue with this proposition, *see* Opp. Br. at 12-13, and, accordingly, there is no need for us to address it further.

B. The second proposition underlying our request for review is that there is significant conflict among the state courts of last resort and federal courts of appeals that have addressed this question of federal law. Pet. at 15-18. This proposition likewise is not challenged by respondents. *See, e.g.*, Opp. Br. at 14 ("*McGrath* [*v. Rhode Island Retirement Bd.*, 88 F.3d 12, 17 (1st Cir. 1996)] recognized the significant disagreement as to when contractually enforceable rights accrue in state and municipal pension plans."); *id.* at 6, quoting from App. at 13a ("[T]he appellate court 'happily deferred' the 'conundrum of a "statutory" contract that may meet this requirement by clear implication rather than clear language.' ") Respondents contend, however, that this does not provide an adequate basis for this Court to grant review. According to respondents, the decision of the court below stands apart from the conflict, because this is "a unique case that affects only [petitioners'] distinct interest in the Employees' Retirement System of the State of Rhode Island." Opp. Br. at 1.[1] That simply is not so.

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[1] Respondents contend and—with a noteworthy flair for hyperbole—attempt to demonstrate that the "Union Pension Act"—*i.e.*, the statute pursuant to which petitioners acquired the retirement benefits that are at issue in this case—was an "errant policy," Opp. Br. at 4, that "slithered" through the Rhode Island Legislature. *Id.* Respondents significantly distort both the substance of the statute and its legislative history, *see* Pet. at 3, but it would serve no purpose to debate these points here. Even if we assume, *arguendo*, that the legislature was ill-advised to have enacted the Union Pension Act in the first place, there is no dispute about the fact that the statute was *validly enacted*. That reality—rather than political hindsight—is the relevant consideration for purposes of constitutional analysis.

1. Respondents argue that "[t]he First Circuit specifically limited its holding to these particular Petitioners," *id.* at 6, and "[w]hat rights public employees may have in their various retirement systems, including Rhode Island's public employees, is not at issue here." *Id.* at 7. Respondents fail to appreciate the full implications of the decision of the court below.

In the Petition, we acknowledged that the First Circuit purported to leave open the possibility that petitioners' rights to retirement benefits might be of a lesser quality than those of "long-time state employees," on the ground that "these particular plaintiffs do not have the benefit of a clear and long standing employer-employee relationship *with the government.*" Pet. at 12 n.14 (quoting App. at 12a) (emphasis in original). As we explained, however, this "purported distinction is untenable . . . [and] the First Circuit's analysis necessarily applies to all members of the Retirement System at issue in this lawsuit, and more generally to public employee members of other state retirement systems as well." Pet. at 12 n.14.[2]

2. Moreover, although the First Circuit asserts at the conclusion of its decision that "[i]t reserves, once again, the very difficult case of the long-time vested or eligible employee whose benefits might be curtailed," Pet. at 17a,

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[2] Specifically, we noted the following points:

> All of the petitioners had an "employer-employee relationship" with an entity that the Rhode Island legislature, in enacting § 36-9-33, determined should be treated as a public employer for purposes of the Retirement System. That employment relationship—alone or in combination with other covered employment—was sufficiently "longstanding" for all of the petitioners to have obtained the requisite ten years of service for their retirement benefits to become vested. . . . [T]here is, thus, no conceivable legal basis for analyzing petitioners' rights under the Retirement System any differently from those of other members of the System, . . .

Pet. at 12, n.14.

the constitutional principles that inform the court's analysis at the very least qualify this reservation. Thus, for example, although many courts have held that retirement benefits are contractually protected when they become "vested," *see* Pet. at 17, the First Circuit did not "think that references in the [retirement] statute to 'vesting' create a contract." App. at 11a. Similarly, the court below concluded that, because "the statute [does not] call the pension plan a 'contract' or contain an anti-retroactivity clause as to future changes," App. at 11a, "it falls at least a step short of clearly expressing a contractual commitment not to change benefit levels or other plan variables by legislation." *Id.* These and other of the First Circuit's conclusions obviously do not "affect[] only [petitioners'] distinct interest in the" Retirement System, Opp. Br. at 11, but "necessarily appl[y] to all members of the Retirement system at issue in this lawsuit, and more generally to public employee members of other state retirement systems as well." Pet. at 12 n.14.

3. As indicated, the court below observed that the outcome might be different if this case involved "longtime state employees," who had "the benefit of a clear and longstanding employer-employee relationship *with the government*." App. at 12a (emphasis in original). Far from constituting "the basis for the First Circuit's Contract Clause decision," as respondents contend, Opp. Br. at 5 n.6, the First Circuit "decline[d] to decide" whether that distinction would lead to a different result. *Id.* Thus, the decision reflects the lower court's uncertainty as to how—if at all—the duration of and/or parties to the employer-employee relationship may be relevant in determining whether a public employee has a contractual right to his or her retirement benefits.[3]

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[3] The First Circuit's subsequent suggestion that only "ordinary full-time employees" may have a contractual right to retirement

Having elsewhere said that "rights gained by service and rights gained by purchase are 'equal in statute' within the [Rhode Island] system," *McGrath v. Rhode Island Retirement Board*, 88 F.3d 12, 20 (1st Cir. 1996), the First Circuit plainly was *not* suggesting in this case that service for the government is the *sina qua non* in determining whether retirement benefits acquired under a state retirement system should be accorded contractual status. Nor is there any apparent reason why that should be so. Numerous states, and the federal government, have determined that service for a union that represents the government's employees—like service for the government itself—should qualify an individual for retirement benefits. *See* Pet. at 3. Many states, including Rhode Island, also credit other types of employment, such as military service (R.I.G.L. § 36-9-31) and private school teaching (§ 36-9-20.1).

It therefore is not surprising that the First Circuit was nor prepared to adopt a rule that only a "longstanding employer-employee relationship with the government," Opp. Br. at 14, 19, can suffice to confer contractual status on the benefits an individual is entitled to receive from a state retirement system. Respondents, however, do not share the First Circuit's uncertainty in this regard. To the contrary, they unhesitatingly posit such a relationship as the *sine qua non* for the existence of contractual rights. *Id.* But there is nothing in this Court's Contract Clause jurisprudence to support that position, and it certainly is not a position that has been embraced by the other courts that have addressed this question. *See* Pet.

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benefits under a state retirement system, thus excluding the benefits of *legislators* from Contract Clause protection, *see Parella v. R.I. Employees' Retirement System*, 173 F.3d 46, 61 (1st Cir. 1999), demonstrates further the absence of clear standards in the First Circuit's analysis.

at 15-17. Indeed, respondents' very suggestion that this type of ill-defined and largely amorphous criterion provides—and even the First Circuit's suggestion that it *might* provide—the basis for determining whether millions of public employees can rely on the retirement benefits to which they are entitled under existing law, serves only to underscore the need for contemporary guidance from this Court.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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